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87-653

Supreme Court, U.S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

GOVERNMENT OF THE VIRGIN ISLANDS,
Petitioner,

v.

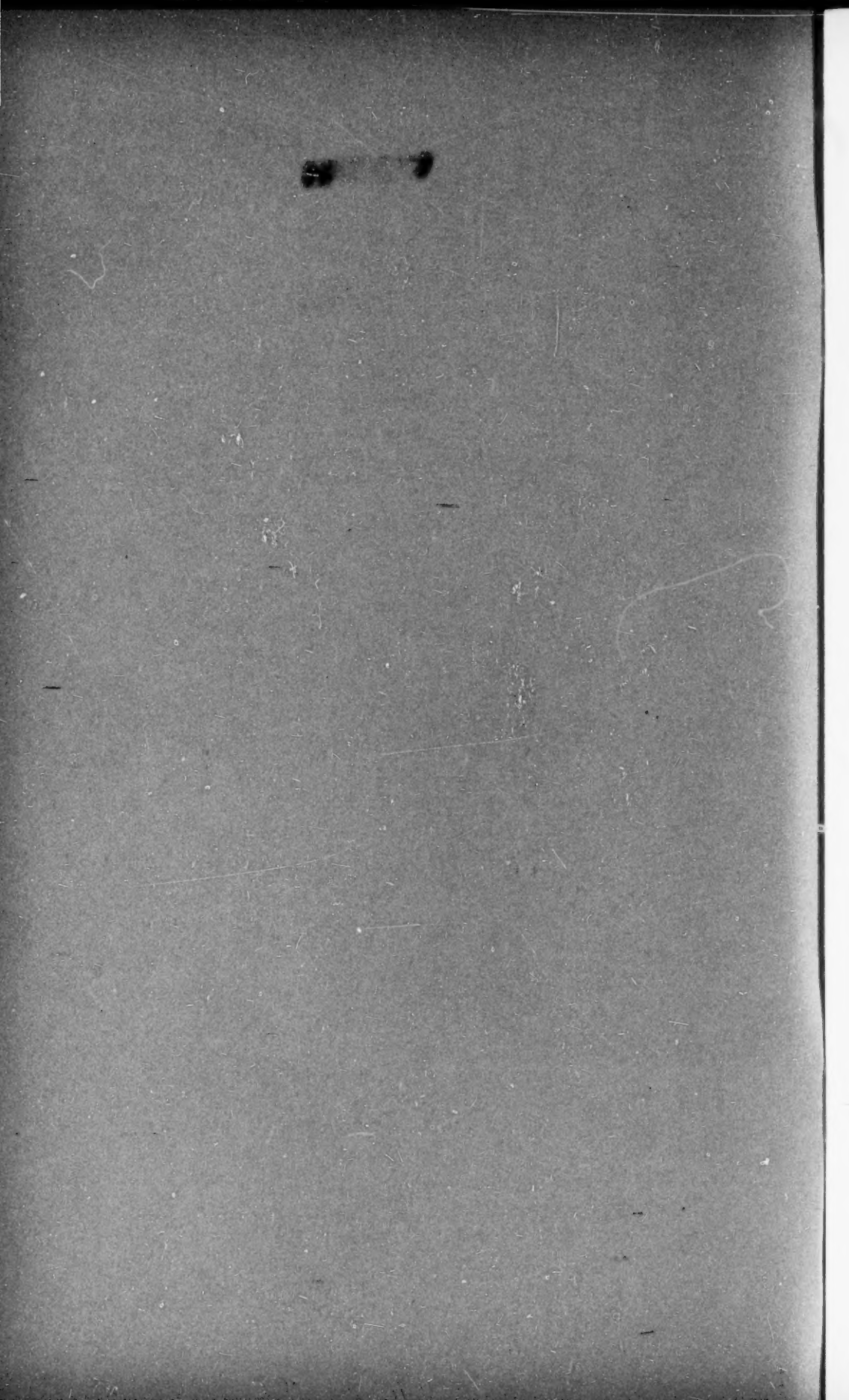
JDS REALTY CORPORATION, formally known as
West Indies Corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, absent an express Congressional application, the Commerce Clause of the United States Constitution limits legislation enacted by the unincorporated territory of the United States Virgin Islands.



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v.

JDS REALTY CORPORATION, formally known as
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Respondent.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

Respondent, JDS Realty Corporation, formerly known as West Indies Corporation (hereinafter "JDS Realty") opposes the Petition for a Writ of Certiorari. The Petition raises no issue worthy of review by this Court. The case is rendered moot by the subsequent amendment by the Virgin Islands Legislature of the underlying taxing statute which the District Court of the Virgin Islands invalidated. The Third Circuit also held that JDS Realty was not entitled to a refund of the tax.

Respondent does not challenge Petitioner's assertions under the headings of Opinions Below or Jurisdiction. To Petitioner's Constitutional and Statutory Provisions Respondent adds the amended Virgin Islands excise tax. Respondent does challenge Petitioner's statement of the

case in connection with the economic impact of the tax and the subsequent legislative history of the Virgin Islands excise tax.

STATUTORY PROVISION INVOLVED

On October 18, 1984, the Virgin Islands Legislature amended the excise tax statute which the District Court had found unconstitutional (33 V.I.C. § 42(a) (1984)). The provisions of the amended territorial act are set forth in the Appendix (Res. App. C 11a).

STATEMENT OF THE CASE

A. The Virgin Islands Excise Tax

The subsequent amendment of the excise tax renders the Petition moot. The excise tax involved in the instant action, read:

All persons, partnerships, firms, corporations or other business associations, excepting those especially taxed or excluded, importing goods, merchandise commodities into the Virgin Islands for personal use or disposition in the course of trade or business or for processing, manufacturing or other business purpose shall pay an excise tax on the value of said goods, merchandise or commodities. . . .

33 V.I.C. § 42(a) (1967).

The District Court on August 14, 1984, entered an Order partially granting Respondent's (Plaintiff JDS Realty) Motion for Summary Judgment with regard to the constitutional issue. On August 24, 1984 it entered its Memorandum Opinion (Pet. App. C 14a). In order to enjoin the collection of the then "unconstitutional" tax on the basis of the District Court's opinion, a case by another Virgin Islands corporation was filed (*St. Thomas Food Products Corporation v. Government of the Virgin Islands, et al.*, District Court of the Virgin Islands, Division of St. Thomas and St. John, Civil No. 84-353

(1984)). The Court issued a temporary restraining order enjoining the Government of the Virgin Islands and the Bureau of Internal Revenue, its agents and employees from further collecting the excise tax (Res. App. A 1a). The Legislature responded by enacting a new statute which overcame the constitutional impediment. (33 V.I.C. § 42(a) (1974)).

The new act read in part:

(a) Every individual and every firm, corporation and other association doing business in the Virgin Islands, except those specially taxed, exempted or excluded shall pay an excise tax on all articles, goods, merchandise or commodities manufactured in or brought into the Virgin Islands for personal use in a business, for disposition or sale in the course of trade or business, for processing or manufacturing or for any other business use or purpose, based on the volume or value of any such articles, goods, merchandise, or commodities. . . .

B. The Decisions Below

While ruling that the Virgin Islands excise tax was unconstitutional, the District Court ruled that JDS Realty passed the burden of the excise tax on to its customers (Res. App. B) and that no refund was due. In its Judgment Order the United States Court of Appeals for the Third Circuit affirmed the judgment of the District Court, (Pet. App. D 30a)

REASONS FOR DENYING THE WRIT

The passage of the amended excise tax and the denial of the refund by the District Court renders the instant action moot. Petitioner contends that the decision of the Third Circuit subjects the Government of the Virgin Islands to refund millions of dollars in excise taxes already collected plus interest. They contend that such a result would put at great risk the Territory's fiscal stability

resulting in cut-backs to vital government programs. To date, no refunds have been given.

In the Memorandum Opinion of the District Court (Res. App. B 4a), the court held that the Government established by a preponderance of the evidence, that the burden of the excise tax was not borne by JDS Realty. The court stated that even though JDS Realty may not have consciously considered the excise tax in setting the prices of its various products, the evidence suggested that the tax did bear upon pricing and that the tax burden was consequently shifted to JDS Realty's customers. There is no reason to believe that any other taxpayer seeking a refund of the tax will prevail, especially in light of the logic of the District Court and judicial authority.

Petitioner contends that the question presented impedes the ability of the Virgin Islands to govern itself. To allow any territory the unregulated power to impose discriminatory taxes would severely damage its relationship with the states. The power to regulate commerce is essential to the federal system. As was stated by this Court in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984),

it has long been the law that States may not "build up [their] domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States." *Guy v. Baltimore*, 100 U.S. [10 Otto] 434, 443 [25 L.Ed. 743] (1880). Were it otherwise, "the trade and business of the country [would be] at the mercy of local regulations, having for their object to secure exclusive benefits to the citizens and products of particular States." *Id.* at 442. It was to prohibit such a "multiplication of preferential trade areas" that the Commerce Clause was adopted. *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 [71 S.Ct. 295, 299, 95 L.Ed. 329] (1951).

Even though neither the constitution nor legislator specifically provides for the applicability of the Commerce Clause to the Virgin Islands, any ruling that would deny

its applicability would create havoc. See *Balzac v. Puerto Rico*, 258 U.S. 298 (1922); *Soto v. United States*, 273 F.628 (3rd Cir. 194).

It should be noted that while the Third Circuit limited its holding to the applicability of the Commerce Clause to the Territory, the lower court also relied on the Import/Export Clause (Pet. App. C) (U.S. Const. Art. I, p. 10.) Respondent also presented the argument that the excise tax was in violation of § 4 of the Act of Congress of March 3, 1917 (Act of March 3, 1917, Ch. 171; 39 Stat. 1132).

CONCLUSION

For the above reasons, Respondent JDS Realty Corporation, respectfully urges this Court to deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX

APPENDIX A

IN THE DISTRICT COURT OF THE
VIRGIN ISLANDS DIVISION OF
ST. THOMAS/ST. JOHN

Civil No. 84-353

ST. THOMAS FOOD PRODUCTS CORP.,
Plaintiff

vs.

GOVERNMENT OF THE VIRGIN ISLANDS
and ANTHONY OLIVE, DIRECTOR OF THE
VIRGIN ISLANDS BUREAU OF INTERNAL REVENUE,
Defendants

TEMPORARY RESTRAINING ORDER

This matter came before the Court on Plaintiff's Motion for a Temporary Restraining Order, supported by the Memorandum of Law in support thereof, the Verified Complaint, and the Affidavit of counsel, from which it appears that Defendants are continuing to collect the excise tax codified at 33 V.I.C. § 42, despite this Court's declaration of the unconstitutionality thereof, as set forth in the Memorandum Opinion of August 24, 1984, in the cause docketed at Civil No. 81-183, entitled *JDS Realty Corp. v. Government of the Virgin*. The continued collection of the excise tax will cause Plaintiff irreparable injury in that there is a continuing wrong being committed by Defendants which cannot be redressed by final relief on the merits, which will necessitate Plaintiff filing a multiplicity of suits against the Defendants on the same issues, and which will necessitate numerous suits by Virgin Islands taxpayers against the same De-

fendants on the same issue. It also appears that because Plaintiff has refused to pay the excise tax since the declaration of unconstitutionality, Defendants will not allow Plaintiff to import goods into the Virgin Islands for resale, which action will cause irreparable injury to Plaintiff's business in that it soon will be forced to shut down operation entirely, dismiss its employees and lose the goodwill of its customers. Further, Plaintiff is being denied its constitutional right to engage in business free of the unconstitutional imposition of the burden placed on interstate commerce by Defendants' continued collection of the illegal tax.

IT IS THEREFORE ORDERED that the Defendants, their officers, agents, servants and employees are temporarily restrained from collecting the excise tax, codified at 33 V.I.C. § 42 and are further restrained from preventing Plaintiff from importing goods into the Virgin Islands for failure to pay the said tax.

That this Temporary Restraining Order be granted on the condition that an undertaking in the sum of \$5,000.00 be filed by Plaintiff to make good such damages not to exceed said sum as may be suffered or sustained by any party who is found to be wrongfully restrained.

That the Defendants be and are hereby directed to show cause, before this Court at 8:45 a.m. on October 15, 1984, why the Plaintiff's Motion for Preliminary Injunction should not be granted.

That this Temporary Restraining Order shall expire at 5:00 o'clock p.m. on October 9, 1984, unless it is further extended by order of this Court.

3a

That this Temporary Restraining Order may be served by any person over the age of eighteen years, selected for that purpose by the Plaintiff.

/s/ Almeric L. Christian
Judge of the District Court of
the United States

Dated: September 28, 1984
5:00 o'clock
P.M.

ATTEST:

GEOFFREY W. BARNARD
Clerk of the District Court

By: /s/ Frank Blackman
Chief Deputy

APPENDIX B

IN THE DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Civil No. 81-183

JDS REALTY CORP., formerly known as
West Indies Corp.,
Plaintiff,

v.

GOVERNMENT OF THE VIRGIN ISLANDS and
LEROY A. QUINN, Director of Internal Revenue,
Defendants.

ARTHUR POMERANTZ, ESQUIRE, P.O. Box 1623, St.
Thomas, Virgin Islands 00801, Attorney for Plaintiff.

LEROY MERCER, ESQUIRE, Assistant Attorney General,
Department of Law, P.O. Box 280, St. Thomas, Virgin
Islands, Attorney for Defendants.

MEMORANDUM

CHRISTIAN, Chief Judge

On August 14, 1984 we granted partial summary judgment in favor of plaintiff JDS Realty Corp., declaring unconstitutional the "excise" tax codified at 33 V.I.C. § 42. By Memorandum Opinion dated August 24, 1984 we clarified our ruling and its constitutional underpinnings. *JDS Realty Corp. v. Government*, 593 F. Supp. 199 (D.V.I. 1984). Defendant Government filed a notice of appeal on August 24, 1984.

The plenary hearing on damages originally scheduled for the trial period beginning October 29, 1984 was continued until the trial period beginning February 4, 1985 due to the ill health of Henry L. Kimmelman, plaintiff corporation's principal witness on damages. When the United States Court of Appeals for the Third Circuit, after requesting briefing on the appealability of our Order of August 14, 1984, set that matter for argument, we continued the damages hearing pending disposition of the said appeal. By Order of May 6, 1985, the Court of Appeals dismissed defendant's appeal for lack of an appealable order.

On May 7, 1985 we issued an extensive pretrial Order, describing in detail the pretrial briefs that were to be submitted by the parties and setting this matter for trial on damages. The matter came on for hearing before this Court on June 28, 1985.

The parties stipulated that during the period for which plaintiff seeks a refund in this action plaintiff paid \$1,544,537.50 in "excise" taxes pursuant to 33 V.I.C. § 42. In light of this stipulation and our holding that the "tax codified at 33 V.I.C. § 42 impermissibly infringes upon the plenary authority of Congress to regulate interstate and foreign commerce in violation of the Commerce and Import/Export Clauses of the United States Constitution," 593 F. Supp. at 207, the sole question to be resolved by this Court is whether plaintiff bore the economic burden of the unconstitutional tax or instead passed on the burden of the tax to its customers.¹

¹ At the close of the trial on June 28, 1985 counsel for both parties agreed that this is the only question now before the Court. Defendant thus seems to have abandoned the position, urged in its opening statement at trial, that plaintiff's profits during the relevant period were so high that to allow a tax refund would be "obscene". In any case, we flatly reject this contention. The magnitude of plaintiff's profits, taken alone, has no bearing on plaintiff's right to a tax refund. See, e.g. *B & M Company v. United States*, 452 F.2d 986, 990-91 (5th Cir. 1971).

Upon review of the evidence presented, we conclude that it is more probably true, than not true, that plaintiff corporation passed on the burden of the excise tax to its customers.

Plaintiff contends that it set the prices of its various products solely on the basis of conditions in the relevant product markets without consideration of the excise tax. Henry L. Kimmelman, chairman of the board and chief executive officer of plaintiff corporation throughout the relevant period, testified that the prices of plaintiff's various products were set at periodic sales meetings. While admitting on cross examination that every element of cost, including the excise tax, was included, for accounting purposes, in the landed cost of each of plaintiff's products, and that those attending the periodic pricing meetings had some idea of the landed cost of each product, Kimmelman testified that figures as to actual landed cost were not available at these meetings. In any case, he asserted, product prices were "ultimately" based on market conditions. As prices were dictated by conditions in the relevant product markets, so the argument goes, plaintiff must have borne the burden of the excise tax. No economic testimony was offered to support this proposition.

James Alston, an agent with the Virgin Islands Bureau of Internal Revenue, testified, by stipulation of the parties, as an expert in accounting and taxation. Alston testified that based upon his review of plaintiff's tax returns and certain work papers prepared by plaintiff's accountants he was of the opinion that plaintiff passed on the excise tax burden to its customers. Alston conceded upon cross examination that he did not know how prices were actually set by plaintiff corporation.

Neither party has presented overwhelming evidence in support of its position. However, notwithstanding plaintiffs protestations to the contrary, we conclude that defendant has demonstrated, by a preponderance of the

evidence, that the burden of the excise tax was not borne by plaintiff.² "The fact that prices are set by the market does not necessarily mean that there is no tax component included in the price," *Rivers Manufacturing Co. v. United States*, 307 F. Supp. 916, 917-18 (D. Col. 1969), *aff'd*, 440 F.2d 780 (10th Cir. 1971). While plaintiff may not have consciously considered the excise tax in setting the prices of its various products, the evidence presented by defendants suggests the tax did bear upon pricing and that the tax burden was, consequently, shifted to plaintiff's customers. The testimony of Kimmelman concerning the mechanics of plaintiff's pricing is simply inadequate, in our view, to overcome the expert testimony of Alston and the inferences he drew from plaintiff's accounting data and tax returns.

It is well settled that "a taxpayer who is allowed the refund of a tax, the economic burden of which has been

² Defendant contends that the burden of demonstrating that the tax was *not* passed on to customers rests with plaintiff and cites numerous cases purportedly supporting this position. The bulk of these cases involve federal statutes expressly conditioning the refund of taxes erroneously collected upon a demonstration by the claimant that he has not included the tax in the price of the article with respect to which the tax was imposed. See *United States v. Jefferson Electric Manufacturing Co.*, 291 U.S. 386 (1934); *F & D Trading Corp. v. United States*, 58 F.2d 414 (Ct. Cl. 1978); *Epstein v. United States*, 357 F.2d 928 (Ct. Cl. 1966); *Norris Dispensers, Inc. v. United States*, 325 F.2d 140 (8th Cir. 1963); *Andrew Jergens Co. v. Conner*, 125 F.2d 686 (6th Cir. 1942); *Riviera Manufacturing Co. v. United States*, 307 F. Supp. 916 (D. Col. 1969), *aff'd*, 440 F.2d 780 (10th Cir. 1971). Not one of the cases cited by defendant addresses the proper assignment of the burden of proof where, as here, the statute authorizing refund claims is silent as to burden of proof. In light of our conclusion that defendant has demonstrated by a preponderance of the evidence that plaintiff passed on the tax to its customers, we need not, and therefore do not, reach the question of whether a claimant under 33 V.I.C. § 1692 must demonstrate, as an element of his cause of action, that he bore the economic burden of the tax for which he seeks a refund, or whether defendant Government must demonstrate, as an equitable defense, that the claimant passed the tax burden on to others.

borne by another, has been unjustly enriched." *Shannon v. Hughes, & Co.*, 109 S.W. 2d 1174, 1175 (Ky. 1937). See also *United States v. Jefferson Electric Manufacturing Co.*, 291 U.S. 386, 402 (1934); *Riviera Manufacturing Co. v. United States*, 440 F.2d 780, 781 (10th Cir. 1971). In light of our conclusion that defendant has demonstrated, to the satisfaction of this Court, that plaintiff did not bear the burden of the excise tax which it seeks to have refunded, Judgment will be entered denying plaintiff the refund it seeks.

DATED: August 14, 1985

DIVISION OF ST. THOMAS AND ST. JOHN

Civil No. 8-183

JDS REALTY CORP., formerly known as
West Indies Corp.,

Plaintiff,

v.

GOVERNMENT OF THE VIRGIN ISLANDS and
LEROY A. QUINN, Director of Internal Revenue,
Defendants.

JUDGMENT

This matter having come on for trial before the Court on damages on June 28, 1985, and the premises considered and the Court being fully advised,

IT IS ORDERED, ADJUDGED and DECREED, for the reasons stated in our Memorandum of even date herewith, that the prayer of plaintiff JDS Realty Corp, for refund of \$1,544,537.50 in "excise" taxes paid pursuant to 33 V.I.C. § 42 for February, 1977 through May, 1978 and July, 1978 through December, 1979 be, and the same is, hereby DENIED, and the complaint of said plaintiff is hereby DISMISSED; and

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that the parties shall bear their respective costs, including attorney's fees.

Dated: August 14, 1985

/s/ Almeric L. Christian
ALMERIC L. CHRISTIAN
Chief Judge

ATTEST:

GEOFFREY W. BARNARD
Clerk of Court

By: /s/ Frank Blackman
Deputy Clerk

APPENDIX C

Section 42(a) (33 V.I.C. § 42(a) 1974)

(a) Every individual and every firm, corporation and other association doing business in the Virgin Islands, except those specially taxed, exempted or excluded shall pay an excise tax on all articles, goods, merchandise or commodities manufactured in or brought into the Virgin Islands for personal use in a business, for disposition or sale in the course of trade or business, for processing or manufacturing or for any other business use or purpose based on the volume or value of any such articles, goods, merchandise, or commodities, . . .